82-2099

NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

October Term 1982

ROBERT L. GIULIANI,

APPELLANT,

V.

WALTER G. CHUCK,

APPELLEE.

Appelant for Appeal - Civil Case

On Appeal from the Intermediate
Court of Appeals of Hawaii

JURISDICTIONAL STATEMENT

ROBERT L. GIULIANI
Attorney in Person

P.O. Box 30862
Honolulu, Hawaii
96820
Tel 808 833 4335

82

NO. 2099

IN THE SUPREME COURT OF THE
UNITED STATES

October Term 1982

ROBERT L. GIULIANI,

Appellant,

v.

WALTER G. CHUCK,

Appellee.

Appellant for Appeal - Civil Case

On Appeal from the Intermediate
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JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED FOR REVIEW

A. WHETHER THE COURT'S RULES WERE UNCONSTITUTIONALLY APPLIED TO EVADE OR DEFEAT FEDERAL CONSTITUTIONAL RIGHTS AND STATUTE.

B. WHETHER THE COURT'S JUDGMENTS ARE VALID TO EXTEND, DE-FACTO, THE LAWYER'S "LAWFUL PRIVILEGE" WHEN REPRESENTING A CLIENT TO DEPRIVE THIRD OR ADVERSE PERSONS OF THEIR LEGAL RIGHTS.

LIST OF PARTIES AFFECTED

INGE E. GIULIANI was a party Plaintiff to the proceedings in the Court whose judgment is sought to be reviewed. She submitted an affidavit to the lower court to withdraw from this case. It is the Appellant's belief that she has no interest in this appeal. Except for the caption, there are no other parties affected by this case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

October Term 1982

ROBERT L. GIULIANI,

Appellant,

v.

WALTER G. CHUCK,

Appellee.

On Appeal from the Intermediate
Court of Appeals of Hawaii

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Appellant, ROBERT L. GIULIANI, respectfully prays that an appeal be granted to review the final judgment of the Intermediate Court of Appeals of Hawaii in the above entitled case.

REFERENCE TO OPINIONS BELOW

The Opinion of the first of two appeals to

the Hawaii Intermediate Appellate Court in this case is found in 1 Hawaii Crt App 379, 620 P.2d 733. The first summary judgment leading to that appeal is in App. C. The second summary judgment in this case is in A.B. The Memorandum Opinion of the Intermediate Appellate Court of the appeal from the second summary judgment is in A.A. The copy of the Order for jury trial is in A.F. The final judgment being appealed from to this Honorable Court is copied into A.G.

JURISDICTION

The nature of the proceedings involve the extent to which a lawyer's "lawful immunity" or "lawful privilege" when representing a client, if it exists, can be applied to protect the lawyer from liability to third or adverse persons when the lawyer causes these persons injury with his intentional acts.

The Defendant CHUCK, acting as a lawyer, materially changed the Appellants' payment terms in an executed real estate contract without the party Appellants' knowledge after

Appellants paid deposit money to the seller. When Appellants refused to execute the legal papers containing CHUCK's varied terms and, instead, acted to legally rescind the contract pursuant to the contract's terms, CHUCK interfered and prevented the return of the Appellants' money.

The date of the entry of the final judgment was Apr 19, 1983 at 1014 AM. This was from a Memorandum Opinion dismissing the Appellant's appeal for want of jurisdiction. If this Honorable Court's determination is that the judgment cannot be considered, then in the alternative, the summary judgment of Apr 24, 1981 at 9:59 AM (A.B) is sought to be reviewed as rendered by the highest court in which a decision could be had. WESTERN UNION TEL CO v HUGHES. The Order Denying Rehearing of the summary judgment was entered July 15,1981 (A.E). The Notice of Appeal respecting the Order Denying Rehearing was entered July 28, 1981 (A.H). The Appellate Court's Order Denying Reconsideration of its

Memorandum Opinion was entered Oct 27, 1982 (A.D). The Application for Writ of Certiorari by the Hawaii Supreme Court was entered Jan 5, 1983 and denied Jan 14, 1983(A.I).

The jurisdiction of this Honorable Court is sought pursuant to 28 USC Sec 1257(1), (3) or, alternatively, 28 USC Sec 2103.

The cases believed to sustain jurisdiction are: NEW YORK ex rel BRYANT v ZIMMERMAN; MISHKIN v NEW YORK; INTERNATIONAL HARVESTER v STATE OF MISSOURI.

CONSTITUTIONAL PROVISIONS, STATUTES, RULES.

A. United States Constitution:
   Amend VII
   Amend XIV

B. United States Statutes
   28 USC Sec 1257(1),(3)
   28 USC Sec 2103
   42 USC Sec 1983

C. Hawaii Constitution
   Art I-Sec 4. DUE PROCESS AND EQUAL PROTECTION.
   Art I-Sec 6. RIGHTS OF CITIZENS.
   Art I-Sec 10. TRIAL BY JURY, CIVIL CASES.
   Art I-Sec 19. LIMITATIONS ON SPECIAL PRIVILEGES.
   Art I-Sec 6. RULES.

D. Hawaii Rules of Civil Procedure
   Rule 16. Pre-trial Procedure; Formulating Case.

RULE 60. Relief from Judgment or Order
RULE 61. Harmless Error
RULE 73. Appeal to Supreme Court and Intermediate Court of Appeals

E. HAWAII REVISED STATUTES
HRS Sec 635-13 Jury, when of right.
HRS Sec 635-15 Functions of Court and Jury.

STATEMENT OF THE CASE

Plaintiffs, as buyers, and HENRY DANG, as seller, executed a real estate contract for the purchase and sale of DANG's property. Plaintiffs paid DANG $1,000.00 deposit pursuant to the contract's terms. Defendant CHUCK, as lawyer, drafted all the legal papers called for in the contract. CHUCK's promissory note materially varied the contract payment terms. It took away all the plaintiffs' leverage in the contract and without this leverage, the Plaintiffs total benefit in the contract was destroyed. As a result, Plaintiffs refused to execute any of CHUCK's papers. Material damage, without fault of the buyers (Plaintiffs), was sustained by the improvements on the property

and the Plaintiffs, thereupon, elected to rescind the contract pursuant to the terms of the contract. The normal contract closing did not occur. After the intended closing date, CHUCK wrote a letter to the Plaintiffs accusing them of contract breach and informing them that he was advising DANG to keep their deposit money. Plaintiffs earnestly tried to have their money returned but CHUCK interfered and prevented the return. It was imperative to the Appellants to avoid lengthy litigation. Nevertheless, CHUCK's acts forced the Plaintiffs to sue DANG for the return of their money. CHUCK's law firm defended DANG. Plaintiffs, pro se, prevailed in that hearing and a subsequent rehearing. CHUCK, through his law firm, appealed to the Hawaii Supreme Court where the Plaintiffs again prevailed some 2 1/2 years later.

As a result of CHUCK's cumulative acts, Plaintiffs sued CHUCK in the present case being appealed from here. The complaint was

entered Nov 18, 1975 in the First Circuit Court of Hawaii. The first of two depositions of Plaintiff ROBERT GIULIANI was entered Sept 7, 1976. CHUCK was granted summary judgment. During the summary hearing, CHUCK's counsel stated:

> "Defendant admits everything in the complaint. There was no cause of action."

The Court denied Rehearing and the Order entered Mar 11, 1977. Plaintiff GIULIANI's Notice of Appeal to the Hawaii Supreme Court was entered Jan 11, 1977.

In a letter addressed to all judges of the Hawaii Appellate Court and entered on Sept 17, 1980(Hi S.C. 6497), the Appellant specially set up or claimed his right and privilege under the Federal Constitution and Federal Statute. The pertinent part:

> "This seems particularly evident in the face of a presumption of Appellants' rights in the contract; the cited provisions in the U.S. and Hawaii Constitutions; cited Hawaii statutes; U.S. statutes(42 USC 1983); all repeating and reinforcing the belief of the importance that the law gives to the protection of an individual's rights from just

such illusions of the lawyer's power and immunity professed by the Appellee and Lower Court in this case." (Emphasis added) The validity of 42 USC Sec 1983 was also drawn in question in the above passage.

The Hawaii Court of Appeals heard the appeal and rendered its Opinion Dec 30, 1980. 1 Haw Ct.App 379,620 P.2d 733. That Opinion remanded the case to the lower court for further proceedings because of insufficiency of facts.

The lower summary court's Order Granting Demand for Jury Trial was entered Feb 25, 1981. The summary court ordered Appellant ROBERT GIULIANI to give a second impromptu deposition, taken Feb 9, 1981, of the events that occurred some seven years earlier. The interrogatories were substantially the same as those in the earlier deposition and nothing was discovered. The Appellant made the entire deposition worthless by disclaiming and qualifying it because of his belief that he could not accurately give the impromp-

tu answers called for after seven years since the events in question occurred. However, the newest defense counsel was to use excerpts from this deposition out of context to gain a summary decision.

A pretrial conference was held for the intended jury trial. The defense lawyer, in his pretrial statement, entered Mar 2, 1981, included "(Stipulation Requested)" for at least four facts that were at issue and further stated, "All other facts are disputed." The pro se Appellant never did agree to any of these stipulations of fact. They were, and remain, issues of fact which are entitled to a jury's determination;HRS Sec 635-15 (A.L). Notwithstanding this, the judge in the conference refused to let the case go to a jury and, instead, at the mere suggestion of this newest defense lawyer, reverted it back to a summary court where it had been heard and argued for about six years. The State cannot deprive Appellant of a Federal

right (Amend VII, A.L) by omitting questions of fact. BROOKLYN BANK v O'NEIL.

No record was made of the conference, notwithstanding the judge's duty to do so. HRCP Rule 16 (A.K).

Back in the summary court, the Appellant and Appellee both entered several pertinent factual documents that were materially identtical. These factual documents overwhelmingly favored the Appellants. They offered sufficient evidence to reach the correct decision 1 Haw Ct App 379,620 P.2d 733. Summary judgment was given to the Defendant lawyer and the Appellants were denied their right to jury trial pursuant to Amend VII, U.S. Const. (A.L) and Haw. Const. Art I-Sec 10 (A.L). These events, together with a flurry of needless defense counsel motions and a procession of replacement lawyers, all occurring within approximately one month was enough to temporarily confuse the pro se Appellant into counting the time for appeal

from the Rehearing date July 15, 1981 (See Jurisdiction above) resulting in a claim of untimely appeal. If the appeal was untimely, it was made after these disruptive, unconstitutional and confusing tactics occurred. These tactics and the resultant claim of untimely appeal did not change the facts and circumstances that cause this suit and, therefore, were not grounds for a responsible judicial decision. The pro se Appellant had been proceeding alone, without legal counsel, for six years with no record of violating the courts' frequently confusing rules; instead, meticulously following them. The Hawaii Appellate Court was made aware of these events but dismissed the appeal for lack of jurisdiction pursuant to the Courts' rules (A.M). The same courts' rules, HRCP RULE 61, prohibits setting aside or vacating the summary judgment "unless refusal to take such action appears to the court inconsistent with substantial justice." (A.N). Under the cir-

cumstances, it should have appeared to the court that the summary judgment was patently inconsistent with substantial justice. The very lenghty procedural rule, HRCP RULE 60, is here quoted in part:

"-- This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. --"

The Appellant made application to the Appellate Court for rehearing and quoted U.S. Const. Amend VII, verbatim therein, thereby specially setting up or claiming his Federal right again. The Rehearing was denied (A.D). The Appellant's Application for Writ of Certiorari to the Hawaii Supreme Court was denied (A.I). Final Judgment was entered Apr 19, 1983. The Hawaii Courts had unconstitutionally applied their procedural rule 73 which had the "force and affect of law" under Haw. Const. Art V-Sec 6 (A.O) to deprive the Appellants of their Federal and State Consti-

tutional rights to equal protection of the law (A.P). See State's rights of citizens and limitation on special privileges (A.R). Appellants had a right to fair trial under due process of law. CHAMBERS v MISSISSIPPI. State cannot deprive a litigant of a federal right by omitting or evading basic questions of fact which the lower courts did do. The judgment was also against the validity of 42 USC Sec 1983 (A.Q) which the Appellant had drawn in question. The Courts' ultimate de-facto granting of "lawful immunity" to the lawyer Defendant in this case, extends too far into the Appellants' rights, under color of law to be ignored. This Honorable Supreme Court has already ruled on the application of 42 USC Sec 1983 to the judicial branch. MIT-CHUM v FOSTER.

REASONS REQUIRING PLENARY CONSIDERATION

The final judgments being appealed justifiably add fuel to the wide spread belief that the judicial system exists to benefit

the favored lawyers and their relatively few preferred clients. For the Court to speak an Opnion that the lawyer can be held liable for his intentional tort against third or adverse persons and then ultimately decline to live up to their Opnion leaves no reason for confidence in the judicial system which is so dominated and controlled by favored lawyers.

The lower courts ultimately unconstitutionally applied their procedural rules to evade or invalidate the Federal Constitution and the State Constitution that grants the Appellants right to jury trial and to equal protection of the laws. The lower courts' final judgments and Opinion granted de-facto "lawful privilege" upon the lawyer in a manner that conflicts with 42 USC Sec 1983. These deprived rights were pivotal to the outcome of this case.

The outcome of this appeal will have a profound, wide spread affect upon defining the extent to which "lawful privilege", if it

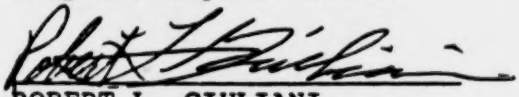
exists, protects the lawyer from direct liability when he unnecessarily injures third or adverse persons without regard to their legal rights. The extent of the lawyers' "lawful privilege" to injure other persons in favor of his client without direct liability is still not settled. This case has all the merits to permanently settle that issue now. This present case is not an isolated one. This appeal carries the issue of the individuals' rights in the Federal Const. and statute and applies on a national scale. A correct decision is of paramount importance.

As an aside, the Appellant submitted complaints on the Defendant lawyer and his defense counsel to the Hawaii Supreme Court's dsiciplinary counsel. After approximately one year of secret deliberation on each complaint, that counsel merely notified the Appellant, in each instance, that the complaint was dismissed. No substantial reason

was given, leaving this Appellant, for one, seriously wondering about that counsel's integrity.

DATED: June 8, 1983.

Respectfully submitted,



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APPENDIX
(Appendix J omitted)

NO. 8390

IN THE INTERMEDIATE COURT OF APPEALS
OF THE
STATE OF HAWAII

ROBERT L. GIULIANI and INGE E. GIULIANI, Plaintiffs-Appellants vs. WALTER G. CHUCK, Defendant-Appellee.	CIVIL NO. 46750 APPEAL FROM THE ORDER GRANTING MOTION FOR SUMMARY JUDGMENT, FILED APRIL 24, 1981; ORDER DENYING MOTION TO AMEND COMPLAINT, FILED JULY 15, 1981 AND THE ORDER DENYING MOTION FOR REHEARING AND RECONSIDERATION OF DECISION, FILED JULY 15, 1981 FIRST CIRCUIT COURT HONORABLE TOSHIMI SODETANI Judge

MEMORANDUM OPINION

This action was previously before this court on Plaintiffs' appeal from summary judgment below in favor of defendant. The judgment was reversed and the case remanded for further proceedings limited to the question of defendant's alleged intentional tort. GIULIANI v CHUCK, 1 Haw App 379,620 P.2d 733 (1980). The case is before us again on Plaintiffs' appeal from a second summary judgment. We hold this court is without appellate jurisdiction in this matter.

APPENDIX A

The judgment and notice of judgment on appeal were filed below on January 2, 1981. On March 11, 1981, defendant filed a Motion for Summary Judgment. On April 24, 1981, after hearing, the following order was entered:

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

Defendant Walter G. Chuck having filed a motion for summary judgment and this motion having come on for hearing on March 31, 1981 and the Court having reviewed the memoranda of counsel and the Court having heard the argument of counsel and the Court being otherwise fully advised in the premises,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that summary judgment be granted in favor of Walter G. Chuck and against Robert L. Giuliani and Inge E. Giuliani.

DATED: Honolulu, Hawaii, April 23, 1981.

/s/ Toshimi Sodetani
Judge of the Above Entitled Court

On May 11, 1981, Plaintiff filed a Motion for Rehearing and Reconsideration of Decision, "pursuant to Rule 60, H.R.C.P. (Hawaii Rules of Civil Procedure) and the record on file herein." This motion was denied by order entered on July 15, 1981, after hearing. On July 28, 1981, plaintiff filed his Notice of Appeal.

Appellee challenges appellate jurisdiction for the reason that appellant's motion for reconsideration under "Rule 60, H.R.C.P." did not terminate the time for filing a notice

of appeal under Rule 73(a), HRCP and, therefore, appellant's notice, filed later than thirty days after judgment, was not timely. Rule 73(a), HRCP (1980, as amended). Appellant argues he "misinterpreted" Rule 73(a) and should not be penalized for that, since his notice of appeal was filed within thirty days of the denial of his motion for reconsideration. Appellant also argues that strict application of Rule 73(a) would be prejudicial to his "substantive rights," citing Hawaii Revised Statutes (HRS) 602-11 (1981 Supp).[1/]

In Madden v Madden, 43 Haw. 148(1959) our supreme court held that it is the substance of a pleading and not its nomenclature

1/ Section 602-11, HRS, provides:

602-11 Rules. The supreme court shall have power to promulgate rules in all civil and criminal cases for all courts relating to process, practices, procedure and appeals, which shall have the force and affect of law. Such rules shall not abridge, enlarge, or modify the substantive rights of any litigant, nor the jurisdiction of any of the courts, nor affect any statute of limitations.

Whenever in a statute it is provided that the statute is applicable "except as otherwise provided," or words to that effect, these words shall be deemed to refer to provisions of the rules of court as well as other statutory provisions.

that determines its nature. Although Appellant here denominated his motion as being under Rule 60, HRCP, it could be argued that it is really a motion to alter or amend judgment under Rule 59(e). However, this interpretation, even if arguably correct, does not resolve the appellant's problem. Appellant's motion for reconsideration was also not timely filed. The order of April 24, 1981, determined with finality the claims of the parties and contained the magic words granting judgment. See M.F. Williams, Inc v. C&C of Honolulu, 3 Haw.App. 319,650 P.2d 599 (1982). The thirty-day period for filing a notice of appeal began to run on that date. Rule 73(a) provides that the thirty-day period is terminated by the timely filing of a motion under Rule 59(e). However, a motion under Rule 59(e) is required to be served not later than ten days after entry of the judgment. Rule 59(e), HRCP (L972, as amended). The record indicates that the motion in the instant case was served on May 11, 1981, seventeen days after judgment. Therefore the appeal period was not terminated and Plaintiff's notice of appeal came far too late. Cf. Naki v. Hawaiian Electric Co.,Ltd, 50 Haw. 85,431 P.2d 943 (1967).

Failure to file a timely notice is a

fundamental jurisdictional defect which can neither be waived by the parties nor disregarded by the court in the exercise of judicial discretion. Independence Mtge. Trust v. Glenn Construction Corp., 57 Haw 554,560 P.2d 488 (1977); Naki v. Hawaiian Electric Co., Ltd., supra; Ho v. Yee, 42 Haw.228 (1957); Price v. Christman, 2 Haw.App.212, 629 P.2d 633(1981).

The provisions of Rule 73(a) are almost crystalline. The appeal period is absolute unless extended by actions taken by the appellant pursuant to those provisions. Plaintiff is no stranger to the appellate process. In addition to the prior appeal in this matter, he was the successful pro se appellee in a related case decided by our supreme court in a memorandum decision.

A party may appear before any court in this state to prosecute or defend his own cause, without the aid of legal counsel, HRS 605-2 (1976), notwithstanding his lack of familiarity with the rules of the law and the practice of the courts. OAhu Plumbing and Sheet Metal, Ltd. v. Kona Construction Inc., 60 Haw.372,590 P.2d 570(1979). However, once he has chosen to represent himself, he must be held to the same standard as if he were represented by counsel. Johnson v. Aetna Casualty and Surety Co. of Hartford Connecti-

cut, ___Wyo.___, 630 P.2d 514, reh'g denied, 454 U.S. 1118,102 S.Ct.961,71 L.Ed.2d 105 (1981); Bly v. Henry, 28 Wash.App.469,624 P. 2d 717 (1981); Homecraft Corp. v. Fimbres, 119 Ariz.299,580 P.2d 760(Ariz App 1978); Bloch v. Bentfield, 1 Ariz App 412,403 P. 2d 559(1965). If he assumes the duties and responsibilities of an attorney, he is then held to the same standards of ethics and knowledge of legal principles and procedures of an attorney, Batten v. Abrams, 28 Wash. App 737,626 P.2d 984 (1981), and he must be prepared to accept the consequences of his mistakes and errors. Heikes v. Fort Collins Production Credit Association, 169 Colo. 27, 456 P.2d 274 (1969). Although a party may not be placed at a disadvantage by his pro se appearance, other than those attributed to his decision to proceed without counsel, he may not gain an advantage by virtue of his own representation. Johnson v. Aetna Casualty and Surety Co. of Hartford Connecticut, supra; Richardson v. White,497 P.2d 348 (Colo-App. 1972); Bloch v. Bentfield, supra.

Section 602-11, HRS, does not assist plaintiff, because he has no right to appeal except where granted by constitution or statute. State v. Shintaku, 64 Haw.307,640 P.2d 289(1982); Chambers v. Leavey 60 Haw.52,587 P.2d 807 (1978).

Dismissed for lack of appellate jurisdiction.

DATED: Honolulu, Hawaii, December 15, 1982

Robert L. Giuliani
plaintiff-appellant
pro se

Roy F. Hughes (James F. Ventura with him on the brief; Libkuman, Ventura, Moon and Ayabe of counsel) for defendant-appellee.

/s/ James S. Burns

/s/ Walter M. Heen

/s/ Harry T. Tanaka

Of Counsel:
LIBKUMAN, VENTURA, MOON,
& AYABE

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Attorney for Defendant

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

ROBERT L. GIULIANI, et al.,	CIVIL NO. 46750
Plaintiffs,	ORDER GRANTING MOTION FOR SUMMARY JUDGMENT
vs.	
WALTER G. CHUCK,	Hearing Date: March 31, 1981
Defendant.	Honorable T. Sodetani

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

Defendant Walter G. Chuck having filed a motion for summary judgment and this motion having come on for hearing on March 31, 1981 and the Court having reviewed the memoranda of counsel and the Court having heard the argument of counsel and the Court being otherwise fully advised in the premises,

IT IS HEREBY, ORDERED, ADJUDGED AND DECREED, that summary judgment be granted in

favor of Walter G. Chuck and against Robert L. Giuliani and Inge E. Giuliani.

DATED: Honolulu, Hawaii, Apr 23, 1981

T. SODETANI
Judge of the Above Entitled Court

Filed Apr 24, 1981

Of Counsel
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Attorney for Defendant

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

ROBERT L. GIULIANI and INGE E. GIULIANI,	CIV. NO. 46750
PLAINTIFFS,	ORDER GRANTING MOTION FOR SUMMARY JUDGMENT AND JUDGMENT
VS.	
WALTER G. CHUCK,	
Defendants.	

ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT AND JUDGMENT

This cause having come on to be heard on November 24, 1976, on Defendant's Motion for Summary Judgment, and the Court having heard argument, and having examined the briefs submitted, it appears to the Court, and the Court so finds, that there is no genuine issue as to any material fact, and that Defendant is entitled to judgment as a matter of law.

WHEREFORE, IT IS ORDERED, ADJUDGED,

AND DECREED that Defendant's Motion for Summary Judgment is granted and that this cause is dismissed with prejudice at Plaintiff cost.

DATED: Honolulu, Hawaii Jan 5, 1976

/s/ Norito Kawakami
JUDGE OF THE ABOVE ENTITLED COURT

APPROVED AS TO FORM:

unsigned
ROBERT L. GIULIANI
Plaintiff in Person

Filed: Jan 5, 1977

NO. 8390

IN THE INTERMEDIATE COURT OF APPEALS
OF THE
STATE OF HAWAII

ROBERT L. GIULIANI and INGE E. GIULIANI,	CIVIL NO. 46750
Plaintiffs-Appellants	
vs.	
WALTER G. CHUCK,	
Defendant-Appellee.	

ORDER DENYING MOTION FOR RECONSIDERATION

This court has considered plaintiff's Motion for Reconsideration filed on December 23, 1982, and the arguments in support thereof. Plaintiff's motion is denied.

DATED: Honolulu, Hawaii, December 27, 1982.

Robert L. Giuliani,
plaintiff-appellant,
on the motion, pro se.

/s/ James S. Burns
/s/ Walter M. Heen
/s/ Harry T. Tanaka

Filed: Dec 27, 1982

APPENDIX D

Of Counsel:
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Attorney for Defendant

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

ROBERT L. GIULIANI,et al., Plaintiffs, vs. WALTER G. CHUCK, Defendant.	CIVIL NO. 46750 ORDER DENYING MOTION FOR RE-HEARING AND RE-CONSIDERATION OF DECISION (June 1, 1981 - Judge T. Sodetani)

ORDER DENYING MOTION FOR RE-HEARING AND RECONSIDERATION OF DECISION

The motion for rehearing and reconsideration of decision filed herein by Plaintiffs having come on for hearing before this Honorable Court on June 1, 1981 and the Court having heard the arguments of counsel and the Court having afforded plaintiff Robert L. Giuliani extra time to file meoranda in connection therewith and the court

having reviewed the matter and all memoranda,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the motion for re-hearing and reconsideration of decision be and hereby is denied.

DATED; Honolulu, Hawaii, July 15, 1981

/s/ T. SODETANI
Judge of the Above-Entitled Court

Filed: July 15, 1981

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Attorney in Person

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

ROBERT L. GIULIANI and INGE E. GIULIANI, Plaintiffs, vs. WALTER G. CHUCK, Defendant.	CIVIL CASE NO. 46750 ORDER GRANTING PLAINTIFFS' MOTION FOR JURY TRIAL

ORDER GRANTING PLAINTIFF' MOTION FOR DEMAND FOR JURY TRIAL

These matters having come on for hearing before the Honorable Toshimi Sodetani on February 10, 1981 on Plaintiff's Motion For Demand For Jury Trial and the Plaintiffs being represented pro se by Plaintiff Robert L. Giuliani, and the Defendant being represented by Ronald T. Fujiwara, and the Court having heard of the Plaintiff pro se and of counsel for the Defendant and being fully advised in premesis and good cause appearing therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. That Plaintiff's Motion For Demand For Jury Trial is hereby granted.

DATED: Honolulu, Hawaii Feb 25, 1981

/s/ T. SODETANI
JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

/s/ RONALD T. FUJIWARA
Attorney for Defendant

Filed: Feb 25, 1981

NO. 8390

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

ROBERT L. GIULIANI and INGE E. GIULIANI,	CIVIL NO. 46750
Plaintiffs-Appellants	APPEAL FROM THE ORDER GRANTING MOTION FOR SUMMARY JUDGMENT, FILED APRIL 24,1981; ORDER DENYING MOTION TO AMEND COMPLAINT, FILED JULY 15, 1981 AND THE ORDER DENYING MOTION FOR RECONSIDERATION OF DECISION, FILED JULY 15, 1981
vs.	
WALTER G. CHUCK,	
Defendant-Appellee	
	FIRST CIRCUIT COURT
	HONORABLE TOSHIMI SODETANI, JUDGE

JUDGMENT ON APPEAL

Pursuant to the memorandum opinion of the Intermediate Court of Appeals of the State of Hawaii filed on December 15, 1982, the appeal is dismissed for lack of appellate jurisdiction.

DATED: Honolulu, Hawaii, Apr 19,1981

APPROVED:
WALTER M. HEEN, JUDGE

Filed Apr 19, 1981 8:26 AM

APPENDIX G

ROBERT L. GIULIANI
P.O. BOX 30862
Honolulu, Hawaii 96820

Attorney in Person

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

ROBERT L. GIULIANI and INGE E. GIULIANI,	)	CIVIL NO. 46750
Plaintiffs,	)	NOTICE OF APPEAL
vs.	)	
WALTER G. CHUCK,	)	
Defendant.	)	

NOTICE OF APPEAL

Notice is hereby given that Plaintiffs, ROBERT L. GIULIANI and INGE E. GIULIANI, hereby appeal to the Supreme Court from the Order Denying Motion for Rehearing and Reconsideration of Decision, entered on 15 July 1981; Order Granting Motion for Summary Judgment entered on 24 July 1981.

DATED: Honolulu, Hawaii, 28 July 1981

/s/ ROBERT L. GIULIANI
Attorney in Person

Filed: July 28, 1981

APPENDIX H

NO. 8390

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1982

ROBERT L. GIULIANI and INGE E. GIULIANI,	) CIVIL NO. 46750
Petitioners-Appellants	) APPLICATION FOR WRIT OF CERTIORARI
vs.	) INTERMEDIATE COURT OF APPEALS
WALTER G. CHUCK,	)
Respondent-Appellee	) HONORABLE JAMES S. BURNS, WALTER M. HEEN and HARRY T. TANAKA, JUDGES

ORDER

The Application for Writ of Certiorari is hereby denied.

DATED: Honolulu, Hawaii, January 14, 1983.

FOR THE COURT:

/s/ H. Lum
Acting Chief Justice

Robert L. Giuliani
Por Se
for the writ

Filed: Jan 14, 1983

APPENDIX I

HAWAII RULES OF CIVIL PROCEDURE (HRCP) Rule 16
PRE-TRIAL PROCEDURE; FORMULATING ISSUES.

In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider:
(1). The simplification of the issues;
(2). The necessity or desirability of amendments to the pleadings;
(3). The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
(4). The limitation of the number of expert witnesses;
(5). The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;
(6). Such matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the proceedings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for considerations as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

UNITED STATES CONSTITUTION, AMEND VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

HAWAII CONSTITUTION Art I-Sec 10

In suits at common law where the value in controversy shall exceed one hundred dollars, the right of trial by jury shall be preserved. The legislature may provide for a verdict by not less than three-fourths of the members of the jury.

HAWAII REVISED STATUTES Sec 635-13

Jury, when of right. When the right of trial by jury is given by the Constitution or a statute of the United States or this State and the right has not been waived, the case shall be tried by a jury.

HAWAII REVISED STATUTES Sec 635-15

Functions of court and jury. In jury trials all questions of law shall be decided by the court and questions of fact by the jury. The court may, however, charge the jury whether there is or is not evidence, indicating the evidence, if any, tending to establish or rebut any specific fact involved in the case.

HAWAII RULES OF CIVIL PROCEDURE (HRCP)
(pertinent parts shown for brevity)

Rule 73. APPEAL TO SUPREME COURT AND INTERMEDIATE COURT OF APPEALS.

(a) How and When Taken. An appeal permitted by law from a circuit court to the supreme court and the intermediate court of appeals shall be taken by filing a notice of appeal with the circuit court within 30 days from the entry of the judgment appealed from, except that: (1) upon a showing of excusable neglect the circuit court in any action may extend the time for filing the notice of appeal not exceeding 30 days from the expiration of the original time herein prescribed; (2) if a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed, whichever last expires. The running of the time for appeal is terminated as to all parties by a timely motion made by any party pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: granting or denying a motion for judgment under Rule 50(b); or granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59. If the order or judgment appealed from is appealable only upon the allowance of the appeal by the court entering it, any application for such allowance must be made within 10 days after entry thereof and the appeal taken within 10 days after the allowance is granted.

Failure of the appellant to take any other step than the timely filing of a notice of

appeal does not affect the validity of the appeal, but is ground only for such action as the supreme court or the intermediate court of appeals deems appropriate, which may include dismissal of the appeal.If an appeal has not been docketed, the parties, with the approval of the circuit court, may dismiss the appeal by stipulation, filed in that court, or that court may dismiss the appeal upon the motion and notice by the appellant.

(b) Notice of Appeal. The notice of appeal shall specify the parties taking the appeal and shall designate the judgment or part thereof appealed from. Notification of the filing of appeal shall be given by the appellant by serving the same in the manner provided in Rule 5.

(g) Docketing the appeal; Filing the Record on Appeal. The appellant shall cause the record on appeal as provided for in Rules 75 and 76 to be filed with the supreme court and the appeal to be docketed there within 40 days from the date of filing the notice of appeal. The record will be filed and the appeal docketed upon receipt by the clerk of the supreme court, within 40 days herein provided or within such shorter or longer period as the court may prescribe, of the record on appeal and, unless the appellant is authorized to proceed without prepayment of fees, of the filing fee fixed by law. When more than one appeal is taken from the same judgment, the circuit court may prescribe the time for filing and docketing, which in no event shall be less than 40 days from the date of filing the first notice of appeal. In all cases the circuit court may extend the time for filing the record and docketing the appeal upon motion of an appellant made within the period for filing and docketing as originally prescribed or as extended by a previous order, or upon its own motion by order entered within such period; but the circuit court shall extend the time to a day more than 90 days from the date of

filing the first notice of appeal. The motion of an appellant for an extension shall show that his inability to effect timely filing and docketing is due to causes beyond his control or to circumstances which may be deemed excusable neglect. The circuit court or the supreme court may require the record to be filed and the appeal to be docketed at any time otherwise provided or fixed.

HAWAII RULES OF CIVIL PROCEDURE (HRCP) Rule 61
HARMLESS ERROR.

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

HAWAII CONSTITUTION Art V-Sec 6. RULES.

The supreme court shall have power to promulgate rules and regulations in all civil and criminal cases for all courts relating to process, practice, procedure and appeals which shall have the force and affect of law.

UNITED STATES CONSTITUTION,Amend XIV, Sec 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

HAWAII STATE CONSTITUTION, Art I-Sec 4.
DUE PROCESS AND EQUAL PROTECTION

No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor ben denied the enjoyment of his civil rights or be discriminated against because of race, religion, sex or ancestry.

42 USC Sec 1983. CIVIL ACTION FOR DEPRIVATION OF RIGHTS.

Every person, who under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

HAWAII CONSTITUTION Art I-Sec 6. RIGHTS OF CITIZENS.

No citizen shall be disfranchised, or deprived of any of the rights or privileges secured to other citizens, unless by the law of the land.

HAWAII CONSTITUTION Art I-Sec 19. LIMITATIONS ON SPECIAL PRIVILEGES.

The power of the State to act in the general welfare shall never be impaired by the making of any irrevocable grant of special privileges or immunities.

IN THE SUPREME COURT OF THE
UNITED STATES

October Term 1982

ROBERT L. GIULIANI,

Appellant,

v.

WALTER G. CHUCK,

Appellee.

Appellant for Appeal - Civil Case

On Appeal from the Intermediate
Court of Appeals of Hawaii

AFFIDAVIT OF SERVICE OF
ROBERT L. GIULIANI

STATE OF HAWAII)
: SS.
CITY AND COUNTY OF HONOLULU)

ROBERT L. GIULIANI, being first duly sworn, on oath, deposes and says:

That He did personally serve three copies of the forgoing Appeal on June 15, 1983 to the following counsel of record for the above named Defendant at the following address by hand delivering the same

to an employee therein:

ROY F. HUGHES 1774
737 Bishop Street
Suite 3000
Honolulu, Hawaii 96813

FURTHER, Affiant sayeth naught.

DATED: Honolulu, Hawaii 15 June 1983.

ROBERT L. GIULIANI

Subscribed and sworn to before me

this 15th day of June 1983.

Notary Public, State of Hawaii

My commission expires: July 1, 1984

82-2099

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

ROBERT L. GIULIANI,
Appellant,
vs.
WALTER G. CHUCK,
Appellee.

MOTION TO DISMISS APPEAL

ROY F. HUGHES
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WALTER G. CHUCK

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

ROBERT L. GIULIANI,
Appellant,
vs.
WALTER G. CHUCK,
Appellee.

MOTION TO DISMISS APPEAL

Appellee, WALTER G. CHUCK, hereby moves this Honorable Court to dismiss the Appeal herein, on the ground that the questions presented by the Appellant, ROBERT L. GIULIANI are so unsubstantial as not to need further argument or review.

I. FACTS AND BACKGROUND

A. Nature of the Case

This action arises out of an agreement of sale entered into between Appellant ROBERT GIULIANI (hereinafter Appellant), Inge Giuliani and Henry Dang through Paulette Ewin, his daughter, on November 21, 1973. Henry Dang went to his attorney, Appellee, WALTER CHUCK (hereinafter Appellee), to draw up the documents. Appellee prepared, in connection with the transaction, a bill of sale covering the buildings, a lease, a leasehold mortgage and the promissory note. By agreement with Paulette Ewin, Appellant took possession of the properties on December 28, 1973. However, on January 12, 1974, Appellant wrote to Appellee rescinding the agreement on the basis that the building at 257 Onewa was uninhabitable.

On February 6, 1974, after consultation with Mr. Dang, Appellee wrote to Appellant, advising him that the $1,000 deposit was forfeited because of Appellant's breach of contract. Appellant sued Henry Dang in the District Court of the First Circuit Court of the State of Hawaii for the return of the $1,000 deposit and prevailed. The decision was appealed to the Supreme Court of the State of Hawaii and was affirmed. Approximately $1,000 was paid for the satisfaction of judgment in favor of Appellant and against Henry Dang. Thereafter, Appellant filed the instant action against Appellee alleging fraud, misrepresentation, and interference in the usurption of his contractual rights. Appellee defended claiming the Complaint failed to state a claim upon which relief could be granted (that Appellee owed no duty to Appellant) and that the matters complained of were done by Appellee in the appropriate and legal course of Appellee's representation of his client, Mr. Dang.

B. **Procedural Background**

On November 24, 1976, Appellee moved for and was granted Summary Judgment. After a Motion for Reconsideration was filed and denied, Appellant appealed the lower court's decision to the Intermediate Court of Appeals for the State of Hawaii. The Intermediate Court of Appeals found that there were no facts or affidavits in the record to support the Motion for Summary Judgment and thereafter reversed and remanded the lower Court's decision. *See, Giuliani v. Chuck*, 1 Haw. App. 379 (1980) (Attached hereto as Exhibit "A"). The Court, while determining that a prima facie tort for intentional harm to a property interest was sufficiently alleged in the Complaint, and recognizing that there may be a privilege, stated that there were no facts in the record upon which to base a decision of the case. (Id.).

On March 11, 1981, following additional discovery, a Motion for Summary Judgment was again filed by Appellee. On April 24, 1981, an Order granting Appellee's Motion for Summary Judgment was entered. On May 11, 1981, Appellant filed a Motion for Rehearing and Reconsideration of Decision

which, after hearing, was denied by Order entered on July 15, 1981. On July 28, 1981, Appellant filed his Notice of Appeal. The Intermediate Court of Appeals, by Memorandum Opinion (attached hereto as Exhibit "B") dismissed the appeal for lack of appellate jurisdiction. Pursuant to the Memorandum Opinion, a judgment on appeal was filed.

On December 23, 1982, Appellant filed a Motion for Reconsideration which was denied on December 27, 1982. On January 5, 1983, Appellant applied for Writ of Certiorari to the Hawaii Supreme Court. The Writ was denied by Order filed January 14, 1983. The instant "appeal" followed pursuant to 28 U.S.C. 1257 and 28 U.S.C. 2103.

II. ARGUMENT

Apparently, Appellant contends that the actions of the state courts in exercising Summary Judgments and dismissing appeals for lack of jurisdiction have denied him his right to a jury trial and equal protection of the laws. While Appellant has not named the proper parties to the appeal (the State of Hawaii), Appellee submits this Brief in support of Motion to Dismiss Appeal.

A. THERE WAS AN ADEQUATE NON-FEDERAL BASIS FOR TERMINATION OF APPELLANT'S APPEAL.

1. *The dismissal of the appeal by the Hawaii Intermediate Court of Appeals was not founded on a Federal question, but on a jurisdictional defect.*

In the instant case, an Order Granting Motion for Summary Judgment was entered on April 24, 1981. On July 28, 1981, Appellant filed his Notice of Appeal to the Supreme and Intermediate Court of Appeals of Hawaii. Rule 73(a) H.R.C.P. requires that the Notice of Appeals be filed "within 30 days from the entry of the judgment appealed from."

The Intermediate Court of Appeals was presented with authority that the failure to file a timely Notice of Appeal constitutes a fundamental jurisdictional defect which can neither be waived by the parties nor disregarded by the Court in the exercise of judicial discretion. *Independence Management*

Trust v. Glenn Construction Corp., 57 Haw. 554 (1977); *Naki v. Hawaiian Electric Co., Ltd.*, 50 Haw. 85 (1967); *Ho v. Yee*, 42 Haw. 228 (1957); *Price v. Christman*, 2 Haw. App. 212 (1981). In citing the above authority and holding the provisions of Rule 73(a) to be clear, the Intermediate Court of Appeals dismissed the appeal from the lower court for lack of appellate jurisdiction.

2. *Jurisdictional defects are adequate grounds for the dismissal of an appeal.*

As previously noted, the Intermediate Court of Appeals dismissed Appellant's appeal. The basis for the dismissal was that as Appellant had not filed a timely Notice of Appeal, the Court lacked jurisdiction. Jurisdiction is the power to hear and decide a case of a particular class. *In Re Abreu*, 27 Haw. 237, 243 (1923). Therefore, as the Court of Appeals had no power to decide the issues sought to be presented, the dismissal of the appeal was proper.

It is well established that a timely filing of the Notice of Appeal is a prerequisite to an appellate court's jurisdiction. *Independence Management Trust v. Glenn Construction Corp.*, 57 Haw. 554, 555 (1977). Further, an appellate court is under an obligation to insure it has jurisdiction to hear and determine each case and to dismiss an appeal on its own motion where it concludes it lacks jurisdiction. *Naki v. Hawaiian Electric Co., Ltd.*, 50 Haw. 85, 86 (1967). In this regard, jurisdictional defects can neither be waived by the parties nor disregarded by the court in the exercise of judicial discretion. (Id.). It is generally considered that the state courts speak with final authority on questions of state law. *See, e. g., Mullaney v. Wilber*, 421 U.S. 684, 689 (1975); *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960); *Murdock v. Memphis*, 22 L.Ed. 429 (1875). Therefore, Appellee submits that the dismissal of the appeal due to a jurisdictional defect was an adequate ground for the Intermediate Court of Appeals' action. Further, as the action of the Intermediate Court of Appeals involved a question of state law, it is submitted that such determination would be binding on this Court.

3. *A jurisdictional defect does not involve a Federal question and a dismissal of an appeal on that basis is not a denial of due process or equal protection.*

Time limits for seeking review in the Supreme Court are jurisdictional. *See, e. g., Federal Trade Commission v. Minneapolis Hunnewell Regulator Co.*, 344 U.S. 206 (1952). The timely filing of a Notice of Appeal is an essential prerequisite to the jurisdiction of the reviewing court and an appeal will be dismissed unless it is timely taken. *Territo v. United States*, 358 U.S. 279 (1959); 13 *Moore's Federal Practice*, ¶ 811.05, S.C. 11-8 (2d ed. 1948). Moreover, there is no provision in the statute or the Court's Rules that permits an extension of the time for taking an appeal. (Id.). *See, Supreme Court Rule* 11.4.

The decision of the Intermediate Court of Appeals was based upon its lack of appellate jurisdiction due to an untimely Notice of Appeal. This Court has also recognized such a defect to be jurisdictional. As jurisdiction constitutes a court's ability to exercise it's judicial power, Appellee submits that no Federal question was involved, and equally, that there has been no denial of equal protection or due process.

4. *This Court should decline to review the Intermediate Court's decision as no Federal question was involved and there was an adequate ground, independent of any Federal question for the Intermediate Court's decision.*

Where a decision of a state court rests upon an adequate non-Federal ground, this Court has declined jurisdiction. *Woolsey v. Best*, 299 U.S. 1, 2 (1936). As stated in *Klinger v. Missouri*, 13 Wall. 257, 263 (1871):

> Where it appears by the record that the judgment of the State Court might have been based either upon a Law which would raise the question of repugnancy to the Constitution, Laws or Treaties of the United States, or upon some other independent grounds; and it appears that the Court, did, in fact, base its judgment on such independent ground, and not on the Law raising the Federal question, this Court will not take jurisdiction of the case, even though it might think the position of the State court an unsound one. But where it does

> not appear on which of the two grounds the judgment was based, then, if the independent ground on which it might have been based was a good and valid one, sufficient of itself to sustain the judgment, this Court will not assume jurisdiction of the case; but if such independent ground was not a good and valid one, it will be presumed that the State court based its judgment on the law raising the Federal question, and this Court will then take jurisdiction.

Moreover, as stated by this Court in *De Saussure v. Gaillard*, 17 U.S. 216, 234 (1887):

> We have repeatedly held that it is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State *having jurisdiction*, but that it's decision of the federal question was actually decided or that the judgment as rendered could not have been given without deciding it. (Emphasis added).

In the instant matter, no federal question was presented to the courts below, and it is clear that adequate grounds independent of any federal question served as a basis for the lower court's decision. The Hawaii Intermediate Court of Appeals dismissed Appellant's appeal for lack of jurisdiction for failure to timely file a Notice of Appeal. The Intermediate Court of Appeal's decision was supported, indeed directed, by decisions of the Supreme Court of the State of Hawaii. Therefore, Appellee submits the Intermediate Court of Appeal's decision to be reasonable and without involvement of Federal constitutional or statutory issues. On this basis, Appellee requests that this Court decline to review the lower Court's decision.

B. THE CASE PRESENTS NO SUBSTANTIAL QUESTION FOR THIS COURT.

1. *The Trial Court's application of privilege for an attorney to give advice does not deny equal protection of the laws.*

One of the grounds for summary judgment was that Appellee, as an attorney, was protected by certain privileges and immunities applying to statements and advice by an attorney to

his client. Appellant apparently maintains that such privilege denies him equal protection of the laws. The privilege asserted does not involve a state statute, regulation or rule, but constitutes the application of a common-law principle. *See, Restatement Second of Torts,* §722, Comment a; *D & C Textile Corp. v. David Rudin* 246 N.Y.S. 2d 813 (1964).

A denial of "the equal protection of the laws" is one which alleges that the state law imposes an "invideous discrimination" upon a certain class. *Williams v. Rhodes,* 393 U.S. 23, 30-34 (1968). A state law invideously discriminates when it creates a suspect classification, *Korematsu v. United States,* 323 U.S. 214 (1944), or infringes upon a fundamental Constitutional right, *Shapiro v. Thompson,* 394 U.S. 618 (1969), and the state fails to show that the law is necessary to promote a compelling state interest. *San Antonio School District v. Rodrigues,* 411 U.S. 1, 16-17 (1973). In this regard, since "the very idea of classification is that of inequality, . . . the fact of inequality [by itself] in no manner determines the matter of constitutionality." *Atchison, Topeka & Santa Fe R.R. v. Matthews,* 174 U.S. 96, 106 (1899).

In the instant case, there is no statute, regulation, or rule involved, but merely the application of a common-law principle regarding an attorney's defenses to tort liability arising out of his representation of a client. Further, Appellant does not, nor can he, assert that he is a member of a suspect classification such as race, gender, or political affiliation. Further, while Appellant has asserted violations of his constitutional rights to a jury trial (which will be addressed *infra*), he does not assert a violation of this right in context to the application of the common-law principles and therefore, there is no violation of a fundamental right which is infringed upon by a state law. The application of a common-law rule does not deny equal protection of the laws. In fact, a rational basis exists for the application of the rule relied upon by Appellee. *See, McLaughlin v. Copeland* 455 F.Supp. 749 (D.C. Del. 1978).

2. *Summary Judgment proceedings do not violate due process or Appellant's right to a jury trial.*

Appellant apparently argues that decision by summary judgment denies him of his right to a trial by jury and the procedure violates due process of law.

At the core of the procedural due process right is the guarantee of an opportunity to be heard and it's corollary, a promise of prior notice. Tribe, *American Constitutional Law*, 10-15 550, 551 (1978). Parties must be appraised of the pendency of the action and be afforded an opportunity to present their side of the issue. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

In the instant action, Appellant has been allowed extensive opportunities to present arguments and objections to the various proceedings below and has made his arguments. Appellant has not objected to any lack of notice and indeed, has actively participated in the proceedings below. Therefore, there have been no due process violations. Answering Appellant's apparent objection to the use of summary judgment procedure as violating his rights to a jury trial, it is clear that no such violation exists.

Rule 56(b) of the *Hawaii Rules of Civil Procedure* (H.R.C.P.) provides in pertinent part as follows:

> A party against whom a claim, counter-claim or crossclaim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

The language in Rule 56 H.R.C.P. is identical to that used in Rule 56 of the *Federal Rules of Civil Procedure*.

Prior to the adoption of the *Federal Rules of Civil Procedure*, this Court has held that a summary judgment procedure does not infringe upon the constitutional right of a party to a trial by jury. *Fidelity & Deposit Co. of Maryland v. United States*, 187 U.S. 315 (1902). In making this determination, it was stated:

> If it were true that the rule deprived Plaintiff in error of the *right* of trial by jury, we should pronounce it void without reference to cases. But it does not do so. It prescribes the means of making an issue. The issue made as prescribed,

> the right to trial by jury accrues. The purpose of the rule is to preserve the Court from frivolous defenses and to defeat attempts to use formal pleadings as means to delay the recovery of just demands. 187 U.S. at 320. (Emphasis supplied).

Furthermore, subsequent to the adoption of the *Federal Rules of Civil Procedure*, this Court in Ex Parte Peterson, 253 U.S. 300 (1920), left no doubt that the summary judgment procedure provided in Rule 56 does not infringe upon constitutional rights to trial by jury. *See*, 6 *Moore's Federal Practice*, ¶ 56.06[1] 56-87 (2d Ed. 1948).

In the instant case, an initial summary judgment was reversed by the Intermediate Court of Appeals for lack of sufficient facts. The trial court, with the guidance and benefit of the opinion in *Giuliani v. Chuck*, 1 Haw. App. 379 (1980), again granted summary judgment on the basis of affidavits and discovery taken subsequent to the remand. The trial court found no material facts in dispute and pursuant to Rule 56 H.R.C.P. granted summary judgment. Appellee maintains that Appellant was afforded a full opportunity to develop facts in dispute and failing to do so, cannot now assert that the lower court's actions deprived him of a right to a jury trial. Indeed, Appellee submits the procedures delineated by Rule 56 H.R.C.P., ". . . is simply one regulating and prescribing procedure whereby the Court may summarily determine whether or not a *bona fide* issue exists between the parties to the action." *General Investment Co. v. Inter Borough Rapid Transit Co.*, 235 N.Y. 133, 142 (1923). (Emphasis supplied).

III. CONCLUSION

Wherefore, Appellee respectfully submits that the question upon which this cause depends is not so substantial as to require further argument or review, *See, Equitable Life Insurance Soc'y v. Brown*, 187 U.S. 308, 311 (1902); and since independent and valid non-Federal grounds formed the basis for the lower court's decision, Appellee respectfully requests this Court to deny jurisdiction and dismiss the appeal herein filed.

Respectfully submitted.

ROY F. HUGHES
LEE T. NAKAMURA
PAUL T. YAMAMURA

Exhibit "A"

ROBERT L. GIULIANI and INGE E. GIULIANI, Plaintiffs-Appellants, *v.* WALTER G. CHUCK, Defendant-Appellee

NO. 6497

APPEAL FROM THE FIRST CIRCUIT COURT
HONORABLE NORITO KAWAKAMI, JUDGE

DECEMBER 1, 1980

HAYASHI, C.J., BURNS, J. AND CIRCUIT
JUDGE AU IN PLACE OF ASSOCIATE
JUDGE PADGETT, DISQUALIFIED

APPEAL AND ERROR — *review — scope and extent in general — summary judgment.*

The questions on appeal from a summary judgment are whether any genuine issue of material fact existed and whether the party prevailing below was entitled to judgment as a matter of law.

SAME — *same — same — same.*

On review of a summary judgment, facts, and inferences drawn from them, are viewed in the light most favorable to the non-moving party.

JUDGMENT — *grounds for summary judgment.*

A defendant moving for summary judgment is entitled to judgment as a matter of law if there is no genuine issue as to any material fact and if, viewing the record in the light most favorable to the plaintiff, it is clear that the plaintiff would not be entitled to recover under any discernible theory.

ATTORNEY AND CLIENT — *the office of attorney — privileges, disabilities and liabilities — liabilities to adverse parties and third persons.*

The rule of law that an attorney representing a client may be held personally liable to an adverse party or a third person who sustains injury as a result of an attorney's intentional tortious acts is well-settled.

PLEADING — *motions — insufficient allegations — application and proceedings thereon.*

The motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted.

SAME — *same — same — same.*

A complaint is not subject to dismissal with prejudice unless it appears to be a certainty that no relief can be granted under any set of facts that can be proved in support of its allegations.

SAME — *same — same — same.*

The rules do not require technical exactness or draw refined inferences against the pleader; rather, they require a determined effort to understand what the pleader is attempting to set forth and to construe the pleading in his favor. This is particularly true when a court is dealing with a complaint drawn by a layman unskilled in the law.

TORTS — *intentional harm to a property interest.*

Intentional harm to a property interest is a cognizable cause of action sounding in tort.

OPINION OF THE COURT BY BURNS, J.

Robert L. and Inge E. Giuliani, plaintiffs below, appeal the granting of summary judgment in favor of Walter Chuck, defendant below, in their tort action against him. The questions on appeal are whether any genuine issue of material fact existed and whether defendant was entitled to judgment as a matter of law. *Technicolor, Inc. v. Traeger*, 57 Haw. 113, 118, 551 P.2d 163, 168 (1976); rule 56, Hawaii Rules of Civil Procedure (HRCP).

For purposes of this appeal, the facts and inferences drawn from them are viewed in the light most favorable to the Giulianis. *Iuli v. Fasi*, 62 Haw. 184, 613 P.2d 653 (1980).

In 1973 the Giulianis, as buyers, entered into a Deposit, Receipt, Offer and Acceptance agreement (DROA) with Henry Chun Hook Dang (Dang), as seller, involving residential property in Kailua, Hawaii.[1] Pursuant to the DROA, the Giulianis paid a $1,000.00 deposit to Dang.

Dang's attorney, Defendant Walter Chuck (Chuck), a lawyer licensed to practice in Hawaii, prepared documents necessary to effect the sale.[2] The documents Chuck prepared did not conform to the terms in the DROA.[3] The Giulianis refused to sign the documents

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[1] In pertinent part, the DROA stated that:

Buyer agrees to pay said purchase price as follows: $10,000 in cash including deposits herein and balance by way of agreement of sale for 3 years at 8% simple interest with monthly payments at least $566.67. At the end of this period, seller agrees to finance buyer with a 1st mortgage requiring 8% interest for 30 years on the remaining balance. . . .

[2] In pertinent part, the DROA stated that:

Buyer shall pay for the cost of drafting the agreement of sale, promissory note. . . .

[3] The promissory note drafted by Chuck called for payment of the total purchase price within three years. No agreement to finance buyer with a first mortgage was presented to the Giulianis.

and made unsuccessful attempts to cause Chuck to reform the documents to conform to the DROA prior to the scheduled closing date (January 15, 1974).

Chuck, by letter of February 6, 1974, advised the Giulianis that their $1,000.00 deposit was forfeit because they had breached the DROA.[4] The Giulianis tried to negotiate the return of the deposit but did not succeed.

In June 1974, the Giulianis sued Dang in district court for rescission of the contract and for return of their $1,000.00. They won. Dang appealed. The Hawaii Supreme Court affirmed the district court's judgment in a memorandum opinion. the Giulianis collected on their judgment.

HAWAII COURT OF APPEALS

Opinion of the Court

After they obtained the district court judgment, the Giulianis filed this suit in circuit court against Chuck. Their amended complaint alleged the above facts and that:

> The Defendant willfully usurped the Plaintiffs' rights in the DROA contract and denied the Plaintiffs access to their $1,000.00. The Defendant compelled Plaintiffs to needlessly enter into litigation to defend their property and rights which, in turn, caused Plaintiffs to suffer mental anguish as well as deprivation of enjoyment over a long period of time. All this inflicted needless harm upon the Plaintiffs. These acts by the Defendant were such as to amount to wanton disregard for the rights, feelings, and personal property of the Plaintiffs and for that reason, Plaintiffs claim;
>
> General Damages against the Defendant in the sum of EIGHTY FIVE THOUSAND DOLLARS ($85,000.00).

Chuck's answer denied the gravamen of the amended complaint and raised the separate defenses that he owed no duty to plaintiffs and that plaintiffs had already received their remedy in the action against Dang.[5]

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[4]The record does not contain a January 12, 1974 letter from the Giulianis to Chuck, which Chuck refers to in his letter as the basis for his allegation that the Giulianis had breached the DROA agreement.

[5]The latter has not been argued on this appeal.

Chuck filed a motion for summary judgment and claimed entitlement to summary judgment because:

1. The amended complaint failed to state a claim upon which relief could be granted, i.e., Chuck owed no duty to the Giulianis; and

2. The matters complained of were done by Chuck in the appropriate and legal course of Chuck's representation of his client Dang, i.e., Chuck did not breach whatever duty, if any, he owed to Giuliani.

The lower court granted Chuck's motion after a hearing. The transcript of that hearing makes it clear that the basis of the court's ruling was its conclusion that the Giulianis had failed to establish any duty owed by Chuck to them. The Giulianis filed a HRCP, rule 60, motion for reconsideration, which the lower court denied after a hearing. In denying the latter motion, the court stated that Chuck owed no duty to the Giulianis and that the district court's decision in the Giulianis' action against Dang indicated that Chuck had sufficient reason to have advised his client Dang to take the actions that he did.

Where the defendant is the moving party, the defendant is entitled to judgment as a matter of law if there is no genuine issue as to any material fact and if, viewing the record in the light most favorable to the plaintiff, it is clear that the plaintiff would not be entitled to recover under any discernible theory. *Abraham v. Onorato Garages*, 50 Haw. 628, 446 P.2d 821 (1968).

On this appeal, the Giulianis rely on HRS § 663-1[6] and the case of *Campbell v. Brown*, 2 Woods 349 (Texas 1876), as authority sufficient to establish that an attorney, while representing a client, has a duty to refrain from committing tortious acts against third parties. They argue that the allegations of their amended complaint are sufficient to establish fraud, misrepresentation, interference in and usurpation of their contractual rights. They assert that the trial court erred in finding that the district court's decision in *Giuliani v. Dang* contained sufficient reason as a matter of law for Chuck to have advised his client to take the actions that he did.

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[6] § 663-1 *Torts, who may sue and for what*. Except as otherwise provided, all persons residing or being in the State shall be personally responsible in damages, for trespass or injury, whether direct or consequential, to the person or property of others, or to their spouses, children under majority, or wards, by such offending party, or his child under majority, or by his command, or by his animals, domestic or wild; and the party aggrieved may prosecute therefor in the proper courts. [Citations omitted.]

Chuck argues that he had no duty to the Giulianis under any discernible theory under any set of facts within the parameters of their allegations and that if he had a duty his actions did not constitute a breach of that duty.

I. DUTY.

The rule of law that an attorney representing a client may be held personally liable to an adverse party or a third person who sustains injury as a result of an attorney's intentional tortious acts is well-settled. *Hoppe v. Klapperich*, 224 Minn. 224, 28 N.W.2d 780 (1947), *Greenwood v. Mooradian*, 137 Cal. App. 2d 532, 290 P.2d 955 (1955), *Newburger, Loeb and Co., Inc. v. Gross*, 563 F.2d 1057 (2nd Cir. 1977). *See Warner v. Roadshow Attractions Co.*, 56 Cal. App. 2d 1, 132 P.2d 35 (1942).

The fact that there are limitations on the extent to which an attorney can go in his or her representation of a client is clearly stated in the Code of Professional Responsibility (CPR), which is made applicable to all Hawaii attorneys by rule 16.2 of the Rules of the Supreme Court of the State of Hawaii.

II. PRIVILEGE.[7]

We are aware of the need to allow attorneys the freedom to represent their clients zealously within the bounds of the law. CPR, canon 7. We recognize a presently undefined area of privilege where an attorney's actions will be deemed justifiable under the circumstances and he or she shall not be held liable for his or her actions.

III. FACTS ON THE RECORD.

Although the complaint in this case was filed on November 18, 1975 and Chuck's motion for summary judgment was filed a year later on November 9, 1976, the factual record is very limited. Chuck's formal discovery was limited to the taking of Mr. Giuliani's deposition and this deposition is not part of the record on appeal. The Giulianis conducted no formal discovery. Chuck did not testify in *Giuliani v. Dang* and the transcript of that trial is not a part of the record in this case. Chuck's motion for summary judgment was not

[7]Restatement, Second, Torts § 890. *Privileges.* One who otherwise would be liable for a tort is not liable if he acts in pursuance of and within the limits of a privilege of his own or of a privilege of another that was properly delegated to him.

accompanied by any affidavits. The record does not contain any affidavits by Chuck or Dang.

We disagree with the lower court's decision that the district court's decision in *Giuliani v. Dang* indicates, as a matter of law, that Chuck had sufficient reason to have advised his client to refuse to refund the Giulianis' $1,000.00 deposit. All that decision indicates is that for undefined reasons rescission of the DROA contract was appropriate and, therefore, that the Giulianis were entitled to a refund of their $1,000.00 deposit.

We disagree with the suggestion that Chuck's February 6, 1974 letter refutes the Giulianis' cause of action as a matter of law. The fact that Chuck stated in writing that he had a legitimate basis for his actions does not make it so. Had he done so under oath then possibly the Giulianis would have been required to respond with some competent evidence showing that there is a genuine issue as to the basis for Chuck's actions. *See* 10 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: Civil § 2727. Such is not the case here so we do not reach that question.

IV. THE CAUSE OF ACTION ALLEGED.

In our view of this case, because of the scarcity of facts on the record, the primary issue raised by Chuck's motion for summary judgment was whether or not the complaint stated a claim upon which relief could be granted. *See* HRCP, rule 12(b)(6), and 5 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: Civil § 1356. Stated another way, the issue was whether the complaint contained a short and plain statement of the claim showing that the plaintiff was entitled to relief. *See* HRCP, rule 8(a).

The motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted. 5 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: Civil 1357. A complaint is not subject to dismissal with prejudice unless it appears to a certainty that no relief can be granted under any set of facts that can be proved in support of its allegations. *Id.* § 1215. The rules do not require technical exactness or draw refined inferences against the pleader; rather, they require a determined effort to understand what the pleader is attempting to set forth and to construe the pleading in his favor. This is particularly true when a court is dealing with a complaint drawn by a

layman unskilled in the law.[8] *Id.* § 1286.

In our view, the essence of the Giulianis' amended complaint is that Chuck intentionally and improperly refused to return their $1,000.00 deposit. Therefore, the amended complaint is sufficient to state a cause of action for intentional harm to a property interest, a cognizable cause of action sounding in tort. Restatement, Second, Torts § 871.

> One who intentionally deprives another of his legally protected property interest or causes injury to the interest is subject to liability to the other if his conduct is generally culpable and not justifiable under the circumstances.

We further find the Giulianis' amended complaint insufficient to allege any other cause of action.

We especially find the Giulianis' amended complaint insufficient to allege a cause of action in fraud. The party asserting such a claim must have relied on the claimed misrepresentation. *Kang v. Harrington*, 59 Haw. 652, 587 P.2d 285 (1978), *Peine v. Murphy*, 46 Haw. 233, 377 P.2d 708 (1962). Here, the facts as alleged by the Giulianis establish quite the contrary. Rather than relying on the documents prepared by Chuck or any of his statements, the Giulianis refused to execute the documents and pursued their legal remedies vigorously.

V. CONCLUSION

Pleadings are not an end in themselves. They are only a means to assist in the presentation of a case to enable it to be decided on the merits. 6 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: Civil § 1473. This opinion states the law applicable to this case. What is missing are the relevant facts. We therefore reverse and remand this case for further proceedings consistent with this opinion.

Robert L. Giuliani, pro se, for plaintiffs-appellants.

Renton L. K. Nip (Huddy T. Lucas on the brief) for defendant-appellee.

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[8] In this case the Giulianis have acted *pro se*.

DISSENTING OPINION OF CIRCUIT JUDGE AU

The majority of this court reverses an order of the trial court which granted summary judgment to the defendant. The majority reasons that the factual record is insufficient to support summary judgment, and the amended complaint is sufficient to state a claim for an intentional harm to plaintiffs' property interest, so far as they allege an intentional and improper refusal, by defendant, to return their $1,000.00 earnest money deposit. The defendant has admitted all of the material allegations of the amended complaint for the purpose of the motion. (Record at 145; 159.)

I dissent from the foregoing holding of the majority. My views are stated hereinbelow.

I am of the opinion that all of the material facts, which are stated in the majority opinion, together with such reasonable inferences as may be drawn therefore in the light most favorable to the plaintiffs, are sufficient for a proper resolution of the question of liability, in favor of the defendant.

The majority holds the plaintiff's claims actionable under § 871 of the Restatement, Second, Torts (1979). That section is but a particularized application of the general principle for intentional tort, as set forth in § 870, and the comments of the reporters of the Restatement thereunder are applicable to § 871.

Section 870 reads as follows:

> § 870. Liability for Intended Consequences—General Principle
> One who intentionally causes injury to another is subject to liability to the other for that injury, if his conduct is generally culpable and not justifiable under the circumstances. This liability may be imposed although the actor's conduct does not come within a traditional category of tort liability.

But, as the reporters comment, it is obvious that not every intentionally caused harm deserves a remedy in tort, and the determination of which ones should be the subject of tort liability is made by resorting to an evaluative process in balancing the conflicting interests of the litigants, in light of the social and economic interests of society in general. *Id.* at 281.

The balancing process, therefore, necessarily involves the court in an evaluative process, hereunder discussed, and in a determination of the actor's conduct as being both "culpable" and "unjustifiable," in the sense that it must be improper and wrongful; "it must be blameworthy, not in accord with community standards of right con-

duct" and "it must also be not excusable or justifiable; a privilege should not be applicable." *Id.* at 282. They further comment:

> It is the plaintiff's responsibility to satisfy the appropriate agency that the [standards have] been breached . . .

Id. at 280.

These two terms, not "excusable or justifiable," describe the evaluative process in balancing the societal interests before liability may be imposed. It must take the court into an analysis of a set of four factors, which are stated by the reporters, as follows:

> This evaluative process therefore involves utilization of all three of the blackletter terms. When analyzed, it breaks down into a set of four factors. These include: (1) the nature and seriousness of the harm to the injured party, (2) the nature and significance of the interests promoted by the actor's conduct, (3) the character of the means used by the actor and (4) the actor's motive. The first factor is of primary concern in applying the blackletter term, injury, and the second factor is of primary concern in applying the blackletter term, not justifiable; the first, third and fourth factors are of substantially equal significance in applying the blackletter term, culpable. The balancing process, however, necessarily involves one single determination, and it cannot be neatly divided into several separate, mutually exclusive determinations.
>
> For one intentional tort—nuisance, when it involves intentional invasion of another's interest in the use and enjoyment of land—the single word "unreasonable" is used to describe the balancing process. (See §§ 826-829A). For the tort of interference with contractual relations the word "improper" is used. (See § 767). A single term, like "wrongful," might have been used here. But the traditional dichotomy in intentional torts of prima facie tort and privilege suggests the desirability of using more than one term.

Id. at 282-283.

All of this puts the imposition of liability under Restatement, § 871, in its proper perspective, to wit: That the determination of initial liability depends upon an interplay of several factors and a finding of privileges depends upon a consideration of much the same factors. But the majority holds the amended complaint legally sufficient and it recognizes a "presently undefined area of privilege where an attorney's actions will be deemed justifiable under the circumstances and he or she shall not be held liable for his or her actions [at

section II of majority]," without indicating how the bases of such undefined privileges may be related to the plaintiffs' legally protected interests.

I do not understand the majority as having undertaken a determination of initial liability in this case by the evaluative process, suggested by the reporters of the Restatement, under either §§ 870 or 871. For the same freedom of action of an attorney under CPR, canon 7, that the majority mentions in its opinion, does form the basis of an established privilege, under the facts and circumstances of this case, and, to my way to thinking, renders defined that which the majority regards as undefined.

As hereinafter mentioned, § 871 is but a particularized application of § 870. The latter section is described, by the reporters, as stating a principle sometimes called "an innominate form of the action of trespass on the case . . . [*Id.* at 280]" which is to say that the law, in this area, has not fully congealed but is still in a developing stage. And in "some cases in which the claim may be entirely novel," they comment, "the court may decide to limit liability to the situation in which the defendant acted for the purpose of producing the harm involved." *Id.* at 280.

I so view this case, and do not find, under the admitted and uncontroverted facts any "generally culpable and not justifiable" conduct of the defendant, which might subject him to liability under the circumstances. As the defendant explains it, he refused, or advised refusing the return of the $1,000.00 to plaintiffs because he deemed plaintiffs to have breached their DROA contract and (albeit, later held erroneous by our supreme court), under the terms and conditions thereof, felt Dang legally entitled thereto. Based upon the admitted and uncontroverted facts, and the reasonable inferences drawn therefrom, I am of the opinion that the defendant had not acted "for the purpose of producing the harm involved."

Therefore, utilizing the evaluative process in balancing the conflicting interests of the litigants and the societal interests, in the manner suggested by the reporters of the Restatement, I am of the conclusion that the defendant is entitled to judgment as a matter of law, upon the factual record of this case, and the reasonable inferences to be drawn therefrom in the light most favorable to the plaintiffs.

I, therefore, dissent.

Exhibit "B"

NO. 8390
IN THE INTERMEDIATE COURT OF APPEALS
OF THE
STATE OF HAWAII

ROBERT L. GIULIANI and INGE E. GIULIANI, Plaintiffs-Appellants, vs. WALTER G. CHUCK, Defendant-Appellee.	) CIVIL NO. 46750) APPEAL FROM THE ORDER GRANTING MOTION FOR SUMMARY JUDGMENT, FILED APRIL 24, 1981; ORDER DENYING MOTION TO AMEND COMPLAINT, FILED JULY 15, 1981 AND THE ORDER DENYING MOTION FOR REHEARING AND RECONSIDERATION OF DECISION, FILED JULY 15, 1981) FIRST CIRCUIT COURT) HONORABLE TOSHIMI SODETANI) Judge

MEMORANDUM OPINION

This action in tort was previously before this court on plaintiffs' appeal from summary judgment below in favor of defendant. The judgment was reversed and the case remanded for further proceedings limited to the question of defendant's alleged intentional tort. *Giuliani* v. *Chuck*, 1 Haw. App. 379, 620 P.2d 733 (1980). The case is before us again on plaintiffs' appeal from a second summary judgment. We hold this court is without appellate jurisdiction in this matter.

The judgment and notice of judgment on appeal were filed below on January 2, 1981. On March 11, 1981, defendant filed a Motion for Summary Judgment. On April 24, 1981, after hearing, the following order was entered:

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

Defendant Walter G. Chuck having filed a motion for summary judgment and this motion having come on for hearing on March 31, 1981 and the Court having reviewed the memoranda of counsel and the Court having heard the argument of counsel and the Court being otherwise fully advised in the premises,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that summary judgment be granted in favor of Walter G. Chuck and against Robert L. Giuliani and Inge Giuliani.

DATED: Honolulu, Hawaii, April 23, 1981.

/s/ Toshimi Sodetani

Judge of the Above Entitled Court

On May 11, 1981, plaintiff filed a Motion for Rehearing and Reconsideration of Decision, "pursuant to Rule 60, H.R.C.P. [Hawaii Rules of Civil Procedure] and the record on file herein." This motion was denied by order entered on July 15, 1981, after hearing. On July 28, 1981, plaintiff filed his Notice of Appeal.

Appellee challenges appellate jurisdiction for the reason that appellant's motion for reconsideration under "Rule 60, H.R.C.P." did not terminate the time for filing a notice of appeal under Rule 73(a), HRCP and, therefore, appellant's notice, filed later than thirty days after judgment, was not timely. Rule 73(a), HRCP (1980, as amended). Appellant argues he "misinterpreted" Rule 73(a) and should not be penalized for that, since his notice of appeal was filed within thirty days of the denial of his motion for reconsideration. Appellant also argues that strict application of Rule 73(a) would be prejudicial to his "substantive rights," citing Hawaii Revised Statutes (HRS) § 602-11 (1981 Supp.).[1]

In *Madden* v. *Madden*, 43 Haw. 148 (1959), our supreme court held that it is the substance of a pleading and not its nomenclature that determines its nature. Although appellant here denominated his motion as being under Rule 60, HRCP, it could be argued that it is really a motion to alter or amend judgment under Rule 59(e). However, this interpretation, even if arguably correct, does not resolve appellant's problem. Appellant's motion for reconsideration was also not timely filed. The order of April 24, 1981, determined with finality the claims of the parties and contained the magic words granting judgment. *See M. F. Williams, Inc.* v. *C & C of Honolulu*, 3 Haw. App. 319, 650 P.2d 599 (1982). The thirty-day period for filing a notice of appeal began to run on that date. Rule 73(a) provides that the thirty-day period is terminated by the timely filing of a motion under Rule 59(e). However, a motion under Rule 59(e) is required to be served not later than ten days after entry of the judgment. Rule 59(e), HRCP (1972, as

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[1]Section 602-11, HRS, provides:

§ 602-11 Rules. The supreme court shall have power to promulgate rules in all civil and criminal cases for all courts relating to process, practices, procedure and appeals, which shall have the force and effect of law. Such rules shall not abridge, enlarge, or modify the substantive rights of any litigant, nor the jurisdiction of any of the courts, nor affect any statute of limitations.

Whenever in a statute it is provided that the statute is applicable "except as otherwise provided," or words to that effect, these words shall be deemed to refer to provisions of the rules of court as well as other statutory provisions.

amended). The record indicates that the motion in the instant case was served on May 11, 1981, seventeen days after judgment. Therefore, the appeal period was not terminated and plaintiff's notice of appeal came far too late. *Cf. Naki* v. *Hawaiian Electric Co., Ltd.*, 50 Haw. 85, 431 P.2d 943 (1967).

Failure to file a timely notice is a fundamental jurisdictional defect which can neither be waived by the parties nor disregarded by the court in the exercise of judicial discretion. *Independence Mtge. Trust* v. *Glenn Construction Corp.*, 57 Haw. 554, 560 P.2d 488 (1977); *Naki* v. *Hawaiian Electric Co., Ltd., supra; Ho* v. *Yee*, 42 Haw. 228 (1957); *Price* v. *Christman*, 2 Haw. App. 212, 629 P.2d 633 (1981).

The provisions of Rule 73(a) are almost crystalline. The appeal period is absolute unless extended by actions taken by the appellant pursuant to those provisions. Plaintiff is no stranger to the appellate process. In addition to the prior appeal in this matter, he was the successful *pro se* appellee in a related case decided by our supreme court in a memorandum decision.

A party may appear before any court in this state to prosecute or defend his own cause, without the aid of legal counsel, HRS § 605-2 (1976), notwithstanding his lack of familiarity with the rules of law and the practice of courts. *Oahu Plumbing and Sheet Metal, Ltd.* v. *Kona Construction, Inc.*, 60 Haw. 372, 590 P.2d 570 (1979). However, once he has chosen to represent himself, he must be held to the same standard as if he were represented by counsel. *Johnson* v. *Aetna Casualty and Surety Co. of Hartford Connecticut*, Wyo. , 630 P.2d 514, *reh'g denied*, 454 U.S. 1118, 102 S.Ct. 961, 71 L.Ed.2d 105 (1981); *Bly* v. *Henry*, 28 Wash. App. 469, 624 P.2d 717 (1981); *Homecraft Corp.* v. *Fimbres*, 119 Ariz. 299, 580 P.2d 760 (Ariz. App. 1978); *Bloch* v. *Bentfield*, 1 Ariz. App. 412, 403 P.2d 559 (1965). If he assumes the duties and responsibilities of an attorney, he is then held to the same standards of ethics and knowledge of legal principles and procedures of an attorney, *Batten* v. *Abrams*, 28 Wash. App. 737, 626 P.2d 984 (1981), and he must be prepared to accept the consequences of his mistakes and errors. *Heikes* v. *Fort Collins Production Credit Association*, 169 Colo. 27, 456 P.2d 274 (1969). Although a party may not be placed at a disadvantage by his *pro se* appearance, other than those attributed to his decision to proceed without counsel, he may not gain any advantage by virtue of his own representation. *Johnson* v. *Aetna Casualty*

and Surety Co. of Hartford Connecticut, supra; Richardson v. *White*, 497 P.2d 348 (Colo. App. 1972); *Bloch* v. *Bentfield, supra.*

Section 602-11, HRS, does not assist plaintiff, because he has no right to appeal except where granted by constitution or statute. *State* v. *Shintaku*, 64 Haw. 307, 640 P.2d 289 (1982); *Chambers* v. *Leavey*, 60 Haw. 52, 587 P.2d 807 (1978).

Dismissed for lack of appellate jurisdiction.

DATED: Honolulu, Hawaii, December 15, 1982.

Robert L. Giuliani,
plaintiff-appellant,
pro se.

Roy F. Hughes (James F. Ventura with him on the brief; Libkuman, Ventura, Moon and Ayabe of counsel) for defendant-appellee.